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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-695

BOONE DESKINS, ... Petitioner,

versus

COMMONWEALTH OF KENTUCKY, . Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

BOONE DESKINS, - - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner Boone Deskins respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals of Kentucky entered in this case on September 13, 1974.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky from which this review is sought, is reported at 512 S. W. 2d 520 (1974) and is printed in the Appendix, *infra,* pp. 1a-15a. The ruling of the Pike Circuit Court from which the appeal to Court of Appeals of Kentucky was taken is not reported and appears in the Appendix, *infra,* p. 16a.

JURISDICTION

The Opinion of the Kentucky Court of Appeals was first rendered on April 19, 1974. Petitioner on May 16, 1974 filed a timely petition for modification of that opinion, which if granted would have substantially altered the nature of the questions presented in this Petition for Writ of Certiorari. In his earnest hope that the Kentucky Court of Appeals would act promptly, Petitioner applied for an extension of time for filing this Petition, which was granted by the Honorable Mr. Justice Stewart, extending the time to and including September 16, 1974 (A-1209). It was not until September 16, 1974 that Petitioner's counsel received notice that the requested modification of the opinion below was denied and that the judgment of the Kentucky Court of Appeals affirming Petitioner's conviction had been entered on September 13, 1974. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date. Petitioner respectfully prays that this Court exercise the discretion vested in it under 28 USC §1257(3) and grant the Writ of Certiorari.

QUESTION PRESENTED

1. Whether the admission into evidence of a surreptitiously recorded post-indictment conversation between Petitioner and a secret agent of the prosecution violated Petitioner's right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution where the court below found that:

a) The Petitioner initiated the meeting with the secret agent;

b) The Petitioner's retained counsel was aware of the meeting but uninformed as to the purpose of the meeting and the identity and true status of the secret agent; and,

c) The Petitioner's conduct at such meeting may in itself have constituted a separate criminal offense.

CONSTITUTIONAL PROVISIONS

The following provisions of the Constitution of the United States are involved:

> AMENDMENT VI: In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.
>
> AMENDMENT XIV, Section I: . . . nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The Petitioner, Boone Deskins, was indicted for the offense of willful murder by conspiracy, aiding and abetting on July 7, 1972. With his case set for trial on March 5, 1973 in the Pike Circuit Court, Pike County, Kentucky, Mr. Deskins was released on bail, after retaining counsel for his defense. Francis Dale Burke was appointed special prosecutor to assist in trying the case.

About two weeks before the trial, on February 18, 1973, one Archel Davidson, an employee of the Special

Prosecutor in a coal business, met with Mr. Deskins and agreed to provide him with Xerox copies of information on his case from the prosecutor's files (Transcript of Evidence, hereinafter T.E., Vol. III, pp. 389, 391-396, 474; Vol. IV, p. 488; Vol. VI, p. 830, See Appendix, pp. 16a-19a). Davidson then reported the agreement to his employer, the special prosecutor, who gave Davidson phony documents to take to Mr. Deskins (T.E., Vol. III, pp. 397-398, See Appendix, pp. 19a-20a). Davidson admitted that he agreed to cooperate with the special prosecutor's attempt to elicit information from Mr. Deskins in exchange for special consideration in criminal actions then pending against Davidson (T.E., Vol. III, p. 477, See Appendix, p. 20a).

On February 21, 1973, an electronic eavesdropping expert of the Kentucky State Police attached a microphone and radio transmitter to Davidson's body and sent him to deliver the phony documents to Mr. Deskins in an unmarked state police car specially equipped to receive and record the Davidson-Deskins conversation (T.E., Vol. III, pp. 398-400; Vol. IV, pp. 512-514, 517-518, 570-571, See Appendix, pp. 20a-24a). The recording of that conversation was introduced into evidence and played to the jury. The text appears at T.E., Vol. IV, pp. 552-568 and is quoted in the opinion of the court below at 512 S. W. 2d 523. See Appendix, pp. 5a-6a. It contains the critical language said to incriminate Mr. Deskins.

On March 3, 1973, two days before trial, Davidson placed a telephone call from the prosecutor's library

to Mr. Deskins (T.E., Vol. III, pp. 406, 410-411, See Appendix, p. 24a), and was recorded by the prosecutor (T.E., Vol. IV, p. 489, See Appendix p. 25a). That recording was also played into evidence and appears in the record at T.E., Vol. IV, pp. 496-500 (See Appendix, pp. 25a-28a).

On the evening before the trial, Davidson again went to Mr. Deskins' home and again secretly recorded their conversation for the Commonwealth Attorney. This conversation was introduced into evidence at T.E., Vol. IV, pp. 566-568 (See Appendix, pp. 28a-29a).

Counsel for the petitioner raised the Constitutional question presented herein by way of a motion for mistrial after the trial court had allowed the playing of the February 21 tape. Defendant's motion appears at T. E., Vol. IV, pp. 600-602 (See Appendix, p. 15a). The trial court overruled the motion at T. E., Vol. IV, pp. 627-628 (See Appendix, p. 16a). The issue was presented on appeal to the Kentucky Court of Appeals, where the judgment of the trial court was affirmed. The opinion of the Kentucky Court of Appeals is reported at 512 S. W. 2d 520 and is printed in the Appendix at pp. 1a-14a. At 512 S. W. 2d 526 the Court of Appeals of Kentucky stated: "We conclude, as did the trial court, that Deskins was not denied his Sixth Amendment right to counsel." (See Appendix, p. 12a.)

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant the Writ of Certiorari Because the Decision Below Resolved a Federal Question of Constitutional Significance in a Manner Not in Accord With the Applicable Decisions of This Court.

In the Court below, Petitioner relied on this Court's decision in *Massiah* v. *U. S.*, 377 U. S. 201 (1963) and *McLeod* v. *Ohio*, 378 U. S. 582 (1965) in asserting that the use of statements, surreptitiously recorded after petitioner's indictment, violated his right to assistance of counsel. The Kentucky Court of Appeals held that *Massiah* doctrine inapplicable where the Petitioner initiated the contact with an agent of the prosecution for what could be construed as an illegal purpose. This decision is in direct conflict with the reversal by this Court, reported at 389 U. S. 45 (1967), of *Beatty* v. *U. S.*, 377 F. 2d 181 (1967).

The *Beatty* case is virtually indistinguishable from Petitioner's case. Beatty, after his indictment arranged to meet with Sirles, a witness in the case. Sirles reported this to an Alcohol and Tobacco Tax Division (ATU) agent who arranged for the surreptitious recording of the Beatty-Sirles conversation. Beatty called the meeting to threaten Sirles that his life would be endangered if he testified against Beatty, such threats being patently illegal. At the meeting Beatty made incriminating statements which were received by the (ATU) agent and admitted at trial.

The Petitioner herein arranged to meet with Davidson in order to obtain Xerox copies of the prosecutor's file regarding this case. Davidson informed the

prosecutor of this and was sent to the meeting electronically wired to record any statements elicited from the Petitioner. The statements made by Petitioner, although consistent with his innocence on the murder charge, were ambiguously incriminating and used against him at trial (see text of statement at 512 S. W. 2d 523 and T. E., Vol. IV, p. 559, Appendix, pp. 5a-6a).

The Court below further decided that *Massiah* was inapplicable to Deskins because the meeting with Davidson was consummated for a criminal purpose, i.e., purloining the Commonwealth's files. Petitioner does not contend that the investigatory procedure relating to his continuing course of conduct was unconstitutional; in fact, *Massiah* expressly allows it. But the use of evidence manufactured by such investigation at the trial of charges for which Petitioner has been indicted before that investigation is unconstitutional under *Beatty* and *Massiah*. This subtlety escaped the Kentucky Court of Appeals.

The Court below further justified its departure from the *Massiah* rule by determining that the Petitioner's trial attorneys were aware of his meeting with Davidson. This fabrication of facts is wholly unsupported by the record and contrary to the findings of the trial court (see T. E., Vol. IV, pp. 604-605). If the Petitioner's constitutional right to counsel turns on this point, we would request that in its review of this case, the Court make its own examination of the facts, as it has done previously when the constitutional right to counsel was jeopardized.[1] If the Writ is granted, Peti-

[1]See *Hudson* v. *State of North Carolina*, 363 U. S. 697 (1960); *Moore* v. *Michigan*, 355 U. S. 155 (1957) and cases cited therein.

tioner would argue that his attorney's awareness of the meeting is immaterial since they could not have known that it was, in fact, a police interrogation and thus could not have known that their presence was constitutionally required.

The United States Supreme Court, in its *per curiam* reversal in *Beatty* cited only *Massiah* v. *U. S.*, 377 U. S. 201, leaving the clear implication that the *Massiah* doctrine was equally applicable to *Beatty*-type factual situations. The Kentucky Court of Appeals in this case has effectively nullified in the State of Kentucky and wherever else its opinion may be persuasive, the right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as enunciated by the United States Supreme Court in *Massiah, McLeod,* and *Beatty.*

Consequently, it is of manifest importance to all individuals currently or subsequently under indictment, and to the police officers and attorneys charged with the prosecution of criminal cases that this Honorable Court grant the Writ and issue a definitive statement to explain the applicability of the *Massiah* doctrine to *Beatty*-type factual situations.

2. The Court Should Grant the Writ of Certiorari Because the Decision Below Raised Significant Recurring Problems and Important Factual Issues Regarding the Relationship Between the Indicted and His Right to Counsel, and the State's Need to Investigate Criminal Activity.

In *Massiah* v. *U. S.*, *supra*, this Court asserted the constitutional principle that incriminating post-indictment statements made by a person during a surreptitious police interrogation, in the absence of retained counsel, could not be admitted against that person at trial. The Sixth Amendment is the source of that principle, which in *McLeod* v. *Ohio*, *supra*, was held applicable to state criminal proceedings. The *per curiam* reversal of *Beatty* v. *U. S.*, *supra*, suggested a broader scope of the *Massiah* rule. Since the *Massiah* decision however, this Court has not issued a more detailed explanation of the *Massiah* holding. Consequently there now exists among the Courts throughout the nation a lack of uniformity in the interpretation of *Massiah*; there is confusion as to whether the *Massiah* doctrine is limited to the special circumstances and particular facts of that case.

One recurring problem is whether *Massiah* applies only where police agents deliberately elicited incriminating statements by trickery or deception. The Ohio Supreme Court in *McLeod* v. *Ohio*, 203 N. E. 2d 349, imposed that narrow interpretation, but was reversed in a Memorandum Opinion of the United States Supreme Court at 378 U. S. 582 (1964). The First Circuit in *Hancock* v. *White*, 378 F. 2d 479 (1967) followed this Court's interpretation of *Massiah* in

McLeod, as have the following jurisdictions: the Third Circuit;[2] the Seventh Circuit;[3] Texas;[4] New Jersey;[5] Connecticut;[6] and Tennessee.[7]

However, other courts, including the Kentucky Court of Appeals in the Opinion below, have failed to recognize that *Massiah* applies to exclude voluntary, uninduced post-indictment statements made to surreptitious government agents in the absence of retained counsel. Among these are the Courts of the Second Circuit;[8] the Fifth Circuit;[9] the Ninth Circuit;[10] Wisconsin;[11] Michigan;[12] and Massachusetts.[13]

Another source of confusion in *Mashiah/Beatty* type cases involves a determination of whether the informant to whom the post-indictment statement was [illegible]e was, in fact, an agent of the prosecution. The Court below took a circuitous route around the *Massiah* rule by finding that Davidson was not a police agent in spite of the fact that he was a paid employee of the Special Prosecutor, Francis Dale Burke, sent to the pre-arranged meeting with Petitioner by the Commonwealth Attorney, Special Prosecutor, and the Kentucky State Police after being wired for sound and

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[2]*U. S. ex rel. O'Conner* v. *New Jersey,* 405 F. 2d 632 (3rd Cir., 1969).

[3]*U. S. ex rel. Milani* v. *Pate,* 425 F. 2d 6 (7th Cir., 1970).

[4]*Anders* v. *State,* 445 S. W. 2d 167 (Tex. Crim. App., 1969).

[5]*State* v. *Green,* 215 A. 2d 546 (N.J., 1965).

[6]*State* v. *Darwin,* 290 A. 2d 593 (Conn., 1972).

[7]*Freshwater* v. *State,* 453 S. W. 2d 446 (Tenn. Crim. App., 1970).

[8]*U. S.* v. *Garcia,* 377 F. 2d 321 (2nd Cir., 1967).

[9]*U. S.* v. *Hayles,* 471 F. 2d 788 (5th Cir., 1973).

[10]*Stowers* v. *U. S.,* 351 F. 2d 301 (9th Cir., 1965).

[11]*State* v. *Chabonian,* 185 N. W. 2d 289 (Wis., 1971).

[12]*People* v. *Caruso,* 175 N. W. 2d 34 (Mich., 1970).

[13]*Commonwealth* v. *Frongillo,* 268 N. E. 2d 341 (Mass., 1971).

instructed in the use of the recording equipment. He was obviously a necessary instrumentality for eliciting and recording incriminating statements. We see absolutely no material difference from the agent involved in *Beatty*. Under the basic law of principal and agent there could be no question that Davidson was an "agent" of the prosecution, but apparently that law is not controlling. Similariy, the Third Circuit in *U. S. ex rel Baldwin* v. *Yeager*, 428 F. 2d 182 (1970) and the Seventh Circuit in *Milani* v. *Pate*, 425 F. 2d 6 (1970) have circumvented the *Massiah/Beatty* decisions of this Court.

The determination of an informant's status as a police agent or private individual has assumed a major constitutional dimension since it now triggers the applicability of the fundamental Constitutional right to assistance of counsel at a post-indictment interrogation. It is imperative that some statement issue from this Court to establish standards for making this factual determination, which if improvidently made has so great an impact on the constitutional rights of the accused.

The decision below, at 512 S. W. 2d 526, illustrates another source of confusion that arises in the *Massiah/Beatty* type cases. The Court below applied the consentual search principle of *Hoffa* v. *U. S.*, 385 U. S. 293 (1966), a Fourth Amendment search and seizure case, to the Sixth Amendment right to counsel asserted by this Petitioner.[14] Even if the Petitioner consented to the

[14]The Sixth Amendment aspect of *Hoffa* is not even applicable to Petitioner's case since Hoffa was not under indictment for crime being investigated when the police agent heard his incriminating statement; his right to counsel for that offense had not yet vested.

entry and search of his home by the police agent, he did in no way waive his right to counsel as a post-indictment interrogation. The distinction between these constitutional principles was also obscurred in *Koran* v. *U. S.*, 408 F. 2d 1323 (5 Cir., 1969), and other cases.

The present case provides this Court with the opportunity to review the *Massiah/Beatty* line of cases and furnish a definitive statement to resolve the important constitutional issues raised herein, and reconcile the many conflicting opinions among the state and federal courts.

CONCLUSION

The case against Mr. Deskins was built around the confession of an alleged co-conspirator, which under Kentucky law must be corroborated with other substantive proof. The only corroborative evidence, sustaining the conviction of Mr. Deskins consists of the ambiguous remarks made in the February 21 conversation, recorded and admitted into evidence. Thus, it is readily apparent that this is neither a case of harmless error, nor one involving a mere "technicality" of criminal procedure; it is the case of a man, falsely accused, whose conviction could be obtained only by violating the Constitution of the United States of America. For this, and the reasons stated above, the Petitioner, Mr. Boone Deskins, respectfully prays that this Court grant the Writ of Certiorari to review the Judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of December, 1974, ~~a copy~~ 3 copies of the Petition for Writ of Certiorari was served upon Respondent by depositing same in the United States Mail, postage prepaid, in an envelope addressed to the Honorable Ed W. Hancock, Attorney General, Frankfort, Kentucky. I further certify that all parties required to be served have been served.

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APPENDIX

COURT OF APPEALS OF KENTUCKY

RENDERED: APRIL 19, 1974

File No. 73-670

BOONE DESKINS - - - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from the Pike Circuit Court
Honorable E. N. Venters, Judge
Indictment No. 2007

OPINION OF THE COURT BY JUSTICE JONES— AFFIRMING

This appeal brings to us for review a judgment of the Pike Circuit Court, entered upon a verdict finding appellant, Boone Deskins, guilty of the crime of the murder of his wife, Gladys Deskins, and fixing his punishment at confinement in the penitentiary for life. The indictment accused Deskins of conspiring with Willard Christian, William Eugene Thompson and Robert Sykes to kill Gladys Deskins.

The facts as presented by the Commonwealth were that Christian was hired by Deskins to commit the foul deed and that Christian enlisted the aid of Thompson and Sykes to kill Mrs. Deskins.

Boone and Gladys Deskins had been married approximately forty years, but a divorce action had been pending in the Pike Circuit Court since 1966. It was shown in evidence that by thrift and good management Boone and

Gladys had acquired as a result of their joint efforts much valuable property in Pike County, and it appears that the divorce had not become final because the two could not agree on a distribution of property.

At the time of the brutal slaying of Gladys, she was living in a small four-room house on John's Creek in Pike County. Boone lived in a trailer at Zebulon in Pike County. On July 12, 1971, the day Gladys was found at her home stabbed several times with a knife and a goodly portion of her head blown away by a shotgun blast, she was to appear with her attorney and with counsel for Boone before the Master Commissioner of Pike County for further divorce proceedings. When she failed to appear at the office of her lawyer at the appointed time, inquiry was made of the neighbors who found her in her bedroom, where she had been murdered.

Almost a year later after an intensive investigation by law enforcement agencies, Boone Deskins and his confederates were indicted for her murder by a Special Grand Jury of Pike County. The Commonwealth's Attorney elected to try Boone first. Deskins employed counsel, was arraigned; and the case was assigned for trial. After one continuance, the case came on for trial at the March 1973 term of the Pike Circuit Court.

In the meantime, for reasons known only to Willard Christian and his Creator, he confessed and told the officers the specifics of the brutal slaying of Gladys Deskins.

Christian testified that Deskins first approached him concerning the commission of this crime in the early summer of 1971. Deskins disclosed on that occasion that he wanted Christian to burn a house located near the house in which Gladys was living. Christian testified that he went to Deskins' trailer where Deskins "asked me how I would feel about burning a house, and I told him I would do it," and he (Deskins) said, "after you do that I've got

another job for you with more money." Christian further testified that he, along with Robert Sykes and another unidentified person, burned the house and that the following day Deskins paid him one thousand dollars, "and he told me to come over in two or three nights that he had another job for me."

At the trial, Christian testified that some few days later he went to Deskins' trailer,

> ". . . and he asked me if I would kill someone and I told him, no, that I wouldn't kill someone myself, and he told me that I should know somebody that would, and I told him that I would check around and see. He told me he would pay seven thousand dollars for the death of his wife, for killing his wife, because she was giving him a lot of trouble and wouldn't give him a divorce."

Christian testified that after discussing Deskins' offer with Robert Sykes, he (Christian) and Sykes contacted William Eugene Thompson, who agreed to commit the murder. Christian further testified that on the evening of July 11, 1971, Sykes drove him and Thompson to a point near Gladys Deskins' home. We deem it appropriate to let Christian tell in his own words what happened. He testified as follows:

> "We (Christian and Thompson) crossed the creek, waded the creek at about twenty-five or thirty feet apart, and went up on the railroad tracks and proceeded toward Mrs. Deskins' house. About half way from where we crossed the creek to her house, we set (sic) down on the railroad tracks because the lights were still on in her house. We sat there approximately an hour until the lights went out in her house and then we sat there awhile longer and then we proceeded on

up to Mrs. Deskins' house. I stopped at an oil drum that looked like where they had burned garbage and Eugene proceeded on to the house. He went to the lower part of the house, toward John's Creek school and he was making all kinds of noise. So I was left there to fire a shot in case anybody came up. Well, I got scared and left, went back down the railroad track, across the creek and just as I . . . during all this time he was a makin' all kinds of noise, kickin' or something, I'm not sure, on the building, and when I got behind the pumping station, above the John's Creek school there, I heard a shotgun blast and I waited there maybe five minutes and Eugene Thompson joined me. . . ."

Christian further testified that he, Sykes and Thompson then proceeded up Caney Creek where they buried the shotgun and that he threw away his shoes. Later, Christian assisted the officers in locating the buried shotgun and his shoes and identified them as exhibits at the trial. Christian then stated that on the evening following the murder he went to Deskins' trailer where Deskins handed him six thousand, nine hundred dollars. (One hundred dollars was withheld for a revolver that Deskins had provided Christian.) Christian then divided the money with Thompson and Sykes.

Deskins testified that he sent for Archel Davidson (Archel Davidson, an employee of Francis Dale Burke in a coal business operated by Burke, was a tried and trusting friend of Deskins. Francis Dale Burke, a practicing attorney of the Pike County bar, was employed as counsel to assist in the prosecution of Deskins.), to meet him at his trailer on February 18, 1973, less than a month before the trial date. As a result of this meeting Deskins agreed to pay Davidson six hundred dollars for copies of material contained in the file of the Commonwealth's Attorney con-

cerning his case. Davidson assured Deskins that he had a daughter-in-law who worked in Burke's office, and that it would be no problem to get the needed materials. Davidson then made this arrangement known to Burke and on February 20, 1973, Burke handed Davidson an envelope containing documents purportedly from the Commonwealth's files. On that same morning, Davidson met Sgt. Marion Campbell of the Kentucky State Police, an expert in electronics, who taped a microphone and radio transmitter under Davidson's clothing. Davidson proceeded to Deskins' trailer and the ensuing conversation between Davidson and Deskins was recorded. The tape recording, which was introduced in evidence, contains the following language which the Commonwealth's Attorney contends is corroborative of Deskins' connection with the murder of his wife:

> Davidson: "I've read Woody Christian's statement here on this thing. I've got the hospital but she didn't get it all. I know, cause I didn't get to talk to her. But they's some shit right here that I want you to read. That son-of-a-bitch had told about the first time that he was ever-about the *house was burnt over there and how you paid him.*"
>
> Deskins: "What I paid him?"
>
> Davidson: "Over at the ice plant and who was with him, all about anything you . . .
>
> Deskins: "Who was with him, *there wasn't nobody with him.*"
>
> Davidson: "Now right here is Woody Christian's evidence, the most important part of it all and you sit right down and read it."
>
> Deskins: "Well, that's about all they got here."
>
> Davidson: "Well, right there is what you want, right there."
>
> Deskins: "Yeah, what Woody Christian told."

Davidson: "They ain't got no case against you. They ain't got nothing said that you ever done anything, just what he told."

Deskins: "*Just the money.*"

Davidson: "Yeah, just the money."

Deskins: "Hell yes, well I knowed that was . . . *had to be true anyhow.*" (Emphasis added.)

The rest of this tape and other conversations similarly recorded on March 3, 1974, and March 4, 1974, merely demonstrate the existence and consummation of a plan whereby Deskins paid Davidson for the purloining of copies of statements of witnesses. These statements were represented by Davidson to be copies of statements contained in the files of the Special Prosecutor, Francis Dale Burke.

The matters of which Deskins complains as error are: (1) that the Commonwealth did not supply Deskins with a bill of particulars sufficiently apprising him of the circumstances of the crime charged; (2) that the trial court allowed the Commonwealth to introduce evidence (recordings of statements made by Deskins while conversing with Davidson) which the Commonwealth had not previously produced pursuant to a court order relating to discovery; (3) that the trial court allowed Deskins' extra-judicial statements to be admitted in evidence when the statements were obtained in violation of Deskins' right to the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution; (4) that the testimony of an accomplice was not corroborated; and (5) that the trial court allowed the Commonwealth to introduce photographs of the victim which served only to bias and prejudice the jury. It is readily discernible that each allegation of error in a measure is intertwined with the others.

Deskins' first complaint is totally without merit. RCr 6.22 relating to a bill of particulars states:

> "The court for good cause shown shall direct the filing of a bill of particulars. A motion for such bill may be made at any time prior to arraignment, or thereafter in the discretion of the court. A bill of particulars may be amended at any time subject to such conditions as justice requires."

More than six months after Deskins had been indicted and arraigned, his counsel filed a scatter-gun or catch-all type of motion for a bill of particulars. This motion was impracticable and it was impossible for the Commonwealth to respond appropriately. Thus the motion was overruled. Thereafter, Deskins filed a more precise, amended, motion for a bill of particulars to which the Commonwealth readily responded. On March 2, 1973, Deskins filed objections and exceptions to the response and filed another motion for an amended bill of particulars. The trial court's ruling on this motion does not appear of record, and was conceded by the parties to be overruled by implication. We cannot perceive that Deskins was prejudiced by the fact that he did not receive the exact date, time and place he was alleged to have conspired to commit the murder of Gladys Deskins. It is a basic premise of the law that the granting of a bill of particulars, after an indictment has been returned addresses itself to the sound discretion of the trial court which will not be overturned on appeal unless there is an abuse of this discretion. James v. Commonwealth, Ky., 482 S. W. 2d 92 (1972). Here, it is clear that the Commonwealth sufficiently complied with Deskins' motion for a bill of particulars by giving all the information available. During the trial there were no dates proven simply because the witnesses could not remember the exact dates on which the conspiracy was formulated. In Harris v. Commonwealth, Ky., 285 S. W. 2d 489 (1956) we said:

> "A corollary rule is that particulars should not be required when the motion appears to be merely an exploratory maneuver or when the accused apparently has knowledge of the facts or when the means of obtaining the facts are just as accessible as to the prosecution." (At 492).

Thus, there was no abuse of discretion in this respect on the part of the trial court.

Deskins next contends that it was prejudicial error for the Commonwealth's Attorney to introduce evidence at trial which he had not produced pursuant to a pre-trial discovery order under the provisions of RCr 7.24. The evidence which is the subject of this contention consists of the three tape-recorded conversations between the witness, Archel Davidson, and the appellant, Boone Deskins. The trial court had a hearing in chambers, out of the presence of the jury on the introduction of the tapes in evidence. He permitted counsel for Deskins to examine Sergeant Campbell of the Kentucky State Police about the manner of the recordation of the tapes, and had the tapes played in the presence of Deskins and his counsel. We are of the opinion that this constituted compliance with the provisions of RCr 7.24.

We deem it appropriate to show in more detail the relationship between Deskins and Davidson, regarding the subject of the recorded conversations, as well as the procurement of documentary evidence from the files of the Commonwealth's Attorney. They were long-time friends and had the same tendency toward greed. Deskins wanted the files of the Commonwealth; Davidson wanted the six hundred dollars. They struck a bargain, and each lived up to it. Deskins was conversing with a person known to him and whom he recognized. He had no guarantee that Davidson would not reveal what he said, and his attempt

to interfere with the processes of the trial court and obtain papers illegally from the Commonwealth's files was admitted by Deskins, for he stated that he delivered the files to his counsel. Deskins testified that his attorneys were aware of the files filched from the Commonwealth, and that he delivered the documents to his attorneys. He further testified that when his counsel received the documents, they laughed about it. Deskins insisted that his attorneys told him that the documents were worthless, yet he was most anxious to receive further documents on the day preceding the commencement of the trial, and they were delivered to him by Davidson on a stairway leading to the office of one of his attorneys.

There was no obligation on the part of the Commonwealth to contact either Deskins or his counsel and to advise them when it was obvious that the tapes were used simply to corroborate the evidence of the witness, Davidson.

The character of the tapes in question is such that Deskins was attempting to subvert the ordinary process of justice by stealing the files from the Commonwealth. It appears from the evidence of record that there is absolutely no conflict as to who made the first contact: Deskins testified that he contacted Davidson; Davidson testified, "I didn't contact him, he contacted me."

When the Commonwealth's Attorney first learned of the attempt to subvert the judicial process he notified the trial court and obtained an order allowing the tape recordings of the conversations between Deskins and Davidson.

Deskins contends that the conversations between him and Davidson and the tape recordings of those conversations are inadmissible under the authority of Massiah v. United States, 377 U. S. 201, 84 S. Ct. 199, 12 L. Ed. 2d 246 (1964). We are unwilling to extend the principles enunciated by *Massiah*, supra, to the facts in this case for

the simple reason that we think the principles are inapplicable and the facts are distinguishable.

The unique circumstances of the case at bar take it outside the realm of the ordinary criminal discovery case wherein a defendant has made statements to law enforcement officers. Here, Deskins contacted a private individual, his trusted friend, soliciting this friend to steal files from the office of the Commonwealth's Attorney, pertaining to his case. The record shows that the first hearing on the discovery motion was held on January 16, 1973. The first contact between Deskins and Davidson was more than a month later, and was had on February 18, 1973. A second contact was made on February 20, 1973, after which the Commonwealth's Attorney obtained permission of the trial court to record the conversations between Deskins and Davidson. The Commonwealth's Attorney need not sit idly by when it is discovered that a defendant, under indictment, and represented by counsel, is undertaking to steal copies of the investigative files of the Commonwealth. In an orderly society there can be no question that individual constitutional rights are not broad enough to allow one charged with crime a license to poison the very foundation of the judicial process. Boone Deskins was not at liberty to personally, or through counsel, subvert the judicial process itself.

Deskins' third argument again concerns the tapes. Under *Massiah*, supra, he contends that since he was represented by counsel at the time the tapes were made, he was denied his Sixth Amendment right to counsel. In other words, he says that at any conversations that he had with Davidson, his counsel should have been present. We reiterate that the facts in the case at bar place it outside the rationale of *Massiah*, supra. In *Massiah*, supra, the United States, in trying to gather evidence to use at the trial, sent an informer (who Massiah obviously trusted) to talk to

Massiah. During the ensuing taped conversation Massiah incriminated himself. The Supreme Court of the United States held this was a violation of the Sixth Amendment right to counsel.

The facts in this case are clearly distinguishable. Here, Deskins, under indictment, represented by counsel, initiated a contract with a private individual (Davidson) and had him steal files from the Commonwealth's Attorney and sell them to him. Davidson could in no way be considered an agent of the Commonwealth. Instead of actually stealing the files, Davidson contacted the special prosecutor, who sought and obtained the aid of the trial court to authorize the electronic surveillance and recordings of subsequent meetings between Deskins and Davidson.

When a defendant imposes his trust in a friend voluntarily, and makes incriminating remarks to his friend, there is nothing that can prevent such person from testifying as to what the defendant stated. In Hoffa v. United States, 385 U. S. 293, 302, 17 L. Ed. 2d 374, 382, 87 S. Ct. 408, 418 (1966), the United States Supreme Court stated:

> "Neither this court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. . . ."

See also Lopez v. United States, 373 U. S. 427, 10 L. Ed. 2d 462, 83 S. Ct. 1381 (1963).

The record in this case reflects that the trial court noted that Deskins' attorneys were aware of the meetings between Deskins and Davidson. On an occasion when the Commonwealth's Attorney made known to the trial court that he had observed in the possession of Deskins' attorneys some of the papers which had been given to Davidson to

convey to Deskins, the trial court stated at a hearing in chambers,

> "So I don't believe that under that situation, that [Deskins] was in a position to claim that he was not properly represented."

We conclude, as did the trial court, that Deskins was not denied his Sixth Amendment right to counsel.

Deskins next contends that there was insufficient corroborating evidence to link him to the commission of the crime. Under the facts and the record, this contention is without merit. The Commonwealth agrees that Christian is an accomplice, and that there is required other evidence linking Deskins with the crime before a conviction can be had on the testimony of Christian. RCr 9.62. This court has consistently held that the corroborative evidence is not required to be so strong as to support a conviction by itself, but it is sufficient if it has a tendency to connect the defendant with the commission of the offense. Hunt v. Commonwealth, Ky., 466 S. W. 2d 957 (1971). The admissions made by Deskins to Davidson clearly linked him with the crime for which he was charged.

Finally, Deskins contends that the trial court erred by allowing the introduction in evidence of photographs of the decedent. All the photographs were taken at the scene of the crime and revealed the nature of the wounds and the position of the decedent at the time she was found by the officers. In this advanced technological age of television, movies and the news media, those persons selected as jurors are able to view a picture of the body of a victim of crime without prejudice to the defendant. Napier v. Commonwealth, Ky., 426 S. W. 2d 121 (1968). We hold that the photographs were competent evidence of the fact that murder had been committed and that Gladys Deskins had died as a result of the gunshot wound.

The state of the case as related by the evidence establishes both the conspiracy and the crime contemplated by the conspiracy. Boone Deskins initiated and set in motion the events that led to the death of his wife, Gladys. The direct result of his contract with Willard Christian and the authority he gave Christian to enlist the assistance of others in carrying out the unlawful conspiracy to commit the crime made him a participant with the same force and effect as if he were physically present with those who committed the foul deed.

A judgment of conviction will not be reversed except when upon a consideration of the whole case, this court is satisfied that the substantial rights of the defendant have been prejudiced. We said in Renaker v. Commonwealth, Ky., 189 S. W. 928 (1916):

> "It is not every error of law on the record that will justify a reversal, but every error relied on will be subjected to the test: Did it prejudice the substantial rights of the accused? If it did, a new trial will be ordered; if it did not, an affirmance of the judgment of conviction will necessarily result." (At 934).

The application of this rule applied to the facts in the case at bar furnishes no ground for disturbing the jury verdict and the judgment of the trial court.

The judgment is affirmed.

All concur.

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APPELLANT'S PETITION FOR MODIFICATION DENIED 9-13-74

MANDATE

THE COMMONWEALTH OF KENTUCKY
The Court Of Appeals
74 Term—April 19, 1974

Appeal from a Judgment of the Pike Circuit Court

Boone Deskins
v.
Commonwealth of Ky.
} Ind. # 2007, File # 73-670

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

(s) Frances Jones Mills, C.C.A.

A copy—Attest:
Issued September 13, 1974

DEFENDANT'S MOTION
T. E., Vol. IV, pp. 600-602

MR. VIMONT:

Comes the defendant, Boone Deskins, by counsel, and moves the Court for a mis-trial, to set aside the swearing of the jury on the grounds that the jury has heard testimony by way of recordings of conversations between this defendant and Archel Davidson; that said recordings were made by Sgt. Marion Campbell of the Kentucky State Police and under his direction and control, at a time subsequent to the indictment of this defendant and after this defendant was out on bond and was represented by counsel. This fact was well known to Commonwealth, and it was specifically known by Detective Potter of the Kentucky State Police, because Detective Potter was present at a time when the Commonwealth Attorney made available to the defendant's attorneys, Charles Lowe and Richard E. Vimont, certain exhibits and other evidence which they proposed to introduce in this case; that the securing of these transcriptions at a time after indictment, without the defendant's knowledge or consent, and at a time when it was well known to the Commonwealth that this defendant was represented by counsel and was not afforded the opportunity to have said counsel present, is in violation of this defendant's rights under the Constitution of the Commonwealth of Kentucky and the Constitution of the United States of America, and the defendant is relying on the case of Massiah v. United States, 377 U. S. at page 201, and subsequent cases relating to the same point of law. This defendant's rights have been infringed upon, he cannot receive a fair trial, and the Court should declare a mis-trial and set aside the swearing of this jury.

* * * * * * *

RULING OF THE PIKE CIRCUIT COURT ON THE DEFENDANT'S MOTION FOR A MIS-TRIAL
T. E., Vol. IV, pp. 627-628

Well, the Court at this time, is not making a finding as to the timeliness of setting out of specific grounds but for the other reasons that I have stated, I'm going to overrule the motions for mis-trial and to set aside the swearing of the jury.

Mr. Lowe: To all of which the defendants objects and excepts.

EXCERPTS FROM TRANSCRIPT OF THE TRIAL IN THE PIKE CIRCUIT COURT

TESTIMONY OF ARCHEL DAVIDSON
T. E., Vol. III, p. 389

9. Do you operate a business or are you employed by someone in the business?

A. I'm employed by the North Star Mining Company, owned by Francis Dale Burke.

* * * * * * *

T. E., Vol. III, pp. 391-396

26. After your son went to see him (Deskins), did you go see him?

A. Oh, yes, in return, the next following morning I went to see him.

27. Where did you see him?

A. At his trailer home over here on Route 119, near Zebulon.

28. And did you go in the trailer and talk to him?

A. Yes, I did.

* * * * * * *

34. Was there anyone else present in the trailer when you talked to him?

A. No one but me and him.

35. I want you to go ahead and tell what your conversation was about, if it was about this case?

A. At that time he asked me, could I help him in his case, he understood that I was—

* * * * * * *

36. Go ahead.

A. So I told him I may be able to help him some, and then we discussed the money problem.

37. Did Mr. Deskins tell you anything specifically that he wanted you to do?

A. Oh, yes.

38. Go ahead.

A. He asked could I—would I be able to get a-hold of any of the Commonwealth's documents in this case.

* * * * * * *

39. Was he talking about my files?

A. Yes, he was.

40. And what did you all discuss about it?

A. We discussed the price I would be paid if I could deliver the documents.

41. Did Mr. Deskins bring that up?

A. Yes, he did.

42. Did you discuss in any way with him as to why he thought you could help him, or how he thought you could get the files?

A. He told me that he understood that I would be in position, the job that I held, that I would be able to get them.

43. Did he mentioned your connection with Francis Dale Burke?

A. Yes, we talked about that.

44. Then what did Mr. Deskins ask you to do?

A. He asked me if I could get the documents and deliver them to him, and I told him I would try and see. Then in return, I got in touch with my employer, Francis Dale Burke.

T. E., Vol. III, p. 474

1. You say you are in the coal business with Francis Dale Burke?

A. No, I'm not in the coal business with him, I work for him.

2. Didn't you say earlier that you was in the coal business with Francis Dale Burke?

A. I said I was employed by Francis Dale Burke.

TESTIMONY OF FRANCIS DALE BURKE
T. E., Vol. IV, p. 488

2. Mr. Burke, what is your profession?

A. I am an attorney at law, practicing law here in Pikeville, Kentucky.

3. Do you know Archel Davidson?

A. I do.

4. Is he in your employment?

A. Yes, sir, he is, he's in my employment in a coal company that I operate.

TESTIMONY OF BOONE DESKINS
T. E., Vol. VI, p. 830

68. Go ahead and tell us when you saw him (Davidson) and what happen.

A. Well, he come one morning over there, telling' me what he could do and he said, I could help you awful well

in that case you've got against you, and we talked on, just one word brought on another, and I said, well, if you could help me, the way they've got me framed, I'd like to find out something about it, I've heard a lot of stuff that I don't know nothing about, is what I told him.

69. Go ahead.

A. Well, he said, I can get it, I can go back, my daughter, or daughter-in-law is working in Francis Dale's office, and—

70. Daughter-in-law?

A. Yes.

71. Alright, go on.

A. And she can make a copy of them papers, catch the days that he's not there and make a copy of them papers, and I'll bring them to you.

TESTIMONY OF ARCHEL DAVIDSON
T. E., Vol. III, pp. 397-398

48. Did you contact anyone after you left his (Deskins) place? (after the February 18th meeting).

A. Yes, I did.

49. Who did you contact?

A. Francis Dale Burke.

50. Then what did you do after that?

A. Well, on the night of February 20th, I was handed an envelope.

51. Who handed you that envelope?

A. Francis Dale Burke.

52. What did you do with it?

A. The following morning at 6:15 in the morning, I delivered that envelope to Boone Deskins.

53. Had you made any contact with him between the

time you saw Mr. Burke and the time you delivered the envelope, on the phone or anything?

A. Yes, I did, that morning, that morning that I delivered the documents, I called him on a pay phone.

TESTIMONY OF ARCHEL DAVIDSON
T. E., Vol. III, p. 477

27. Now, when you told him you would get this information for him, did Mr. Burke or somebody else have it set up where you would try to get this information.

A. Mr. Burke delivered to me an envelope with the documents, that I delivered to him.

28. And how much money had you been promised to go along with the Commonwealth on this?

A. None at all.

29. You have been promised something, haven't you?

A. No, I haven't. My lawyer, Francis Dale, said in other cases pending, I might get some consideration if I'd go along and help get the truth out of this case.

30. What other cases pending?

A. I have a case in Federal Court that is pending.

31. Criminal case?

A. Yes, it is.

TESTIMONY OF ARCHEL DAVIDSON
T. E., Vol. III, pp. 398-400

55. Now, prior to you going over there (Deskins' Home) did you meet with anyone else?

A. Yes, I did.

56. Who did you meet with?

A. Sgt. Butch Campbell of the Kentucky State Police.

* * * * * * *

59. Then what did you do?

A. I met with him at approximately fifteen till 6:00 that morning, and he taped on my body a thing, looked to me like a microphone.

* * * * * * *

68. After you got that taped on you, where did you go?

A. I drove to the Town and Country Shopping Center and called Mr. Deskins.

69. What did you tell him?

A. I told him I needed to see him, and he said, come on over.

70. Did you have the package with you at the time?

A. Yes, I did.

71. Was that the information that he asked you to supply him?

A. Well, he asked me, did I have it all, after I got in there, and I told him I didn't know, that I had a good deal of it.

72. But that was the stuff that he asked you to get and bring to him?

A. That's right, the Woody Christian file and things concerning his case.

73. Did you all enter into a conversation inside his trailer?

A. Yes, we did.

74. Did anybody follow you over there?

A. Yes, sir.

75. Who was that?

A. Sgt. Butch Campbell of the Kentucky State Police.

76. Did he do anything else to you before he released you to go to Mr. Deskins' trailer?

* * * * * * *

77. Whose automobile did you go in?

A. I drove his car.

TESTIMONY OF SGT. MARION CAMPBELL, KENTUCKY STATE POLICE
T. E., Vol. IV, pp. 512-514

14. Did you have any later contact with him (Davidson)?

A. Yes, sir.

15. Where was that?

A. That was at the Moderne Villa Motel on Wednesday morning, February 21, 1973, at 5:45 in the morning.

16. What did you all do there?

A. At this time I placed on his body, a remote controlled microphone.

17. Do you have that microphone with you?

A. Yes, I do.

18. I would like for you to display it to the jury, Sgt. Campbell.

* * * * * * *

22. I see that you have a wire in your hand, what is that?

A. This is the actual microphone located at the top of this cannister with the batteries installed, and I placed this on Mr. Davidson's body, under his clothing, in such a manner—in a manner such as this, taped this to his body with scotch tape.

23. Now, you're indicating that—you're holding the small metal unit near your waist and you're stretching the wire vertically up near your right shoulder blade, is that correct?

A. Yes, but on this particular case, I believe it was on the left side.

24. Left side?

A. Yes, sir.

25. And you did run the wire up his body and taped it to his flesh?

A. Yes, sir.

26. I see you have a brief case type of affair with you, what is that, Sgt. Campbell?

A. This is the actual tape recorder that picked up the signals from this microphone.

27. Would you open that up and let the jury see it, please?

A. Yes, sir.

* * * * * * * *

T. E., Vol. IV, pp. 517-518

46. Now, Sgt. Campbell, when you taped this transmitter on Archel Davidson, where did you say you were?

A. At the Moderne Villa Motel, South of Pikeville, on U. S. 23, I believe it is.

47. And I believe you said that was February 21, at five something in the morning?

A. 5:45 in the morning.

48 Now, what did you do after you taped this device on him?

A. Proceeded to the residence of Mr. Boone Deskins.

49. Before you went over there, did you do anything else with Mr. Davidson, did you follow him over there?

A. Yes, sir, I did.

50. What type of vehicle did he go in?

A. He went in my vehicle, a 1972 Ford.

* * * * * * * *

T. E., Vol. IV, pp. 570-571

16. Did your superior direct you to bring with you the Bell and Howell recorder, about which you have testified here today?

A. Yes, sir.

17. And you had that equipment in your car with you?

A. Yes, sir.

18. Is your vehicle one that is furnished to you by the Commonwealth of Kentucky?

A. Yes, sir.

19. Does it carry official license tag on it?

A. No, sir.

20. It carries the standard Kentucky license plate?

A. Not at this time, no, sir.

21. What did it carry on February 20, 1973?

A. West Virginia license plate.

22. Does the car have any markings that would indicate it is a vehicle owned by the Commonwealth of Kentucky?

A. No, sir.

TESTIMONY OF ARCHEL DAVIDSON
T. E., Vol. III, p. 406

115. And after you contacted Mr. Burke, did you then have another meeting with Mr. Deskins?

A. Yes, I did.

116. When and where was that?

A. I talked to—called Mr. Deskins on February (Sic, March) the 3rd, on the phone, had a phone conversation with him.

117. Where did you call him from?

A. Francis Dale Burke's library.

* * * * * * *

T. E., Vol. III, pp. 410-411

Q. Mr. Davidson, to refresh your recollection, was that February 3rd or March 3rd?

A. March 3rd.

Q. And did you talk to Mr. Deskins on the telephone there in Mr. Burke's office?

A. Yes, I did.

Q. Can you give us the substance of that conversation?

A. Well, I told him I had some more files for him and he said to bring them on over.

TESTIMONY OF FRANCIS DALE BURKE
T. E., Vol. IV, p. 489

5. Mr. Burke, on Saturday, March 3rd, was Mr. Archel Davidson in your office here in the city of Pikeville?

A. He was.

6. At the time he was in your office, did he place a telephone call to the defendant, Boone Deskins?

A. Yes, sir, he did.

7. When he placed that telephone call, was there a recording device placed on the telephone?

A. Yes, sir.

TRANSCRIPT OF MARCH 3rd DAVIDSON-DESKINS CONVERSATION
T. E., Vol. IV, pp. 496-500

At this time the cassette recording of the telephone conversation between the defendant and witness, Archel Davidson, made on March 3, 1973, and filed as Commonwealth Exhibit No. 18, was played to the jury, as follows:

Phone ringing.

Boone: Hello.

Archel: Boone?

Boone: Un huh.

Archel: This is Archel again.

Boone: Yeah.

Archel: Eh, Boone.

Boone: Yeah.

Archel: I got a call while ago and I've got to go out of town, fellow suppose to—I've got a little deal a-working.

Boone: Yeah.

Archel: And I need to leave right now going to see him. I've just wondered if I could call you in the morning some time and meet you tomorrow with this stuff. I got

the stuff that you need and it will help you some, and I'm a little leary about coming around that damn trailer, they may be watching me over there somewhere.

Boone: Well, I could meet you out.

Archel: Well, what about Gibson's Parking Lot, or somewhere like that, and I could just deliver it to you to your car, truck or whatever.

Boone: Well, it's too damn public there, what's the matter you didn't come out the other night at the top of the hill.

Archel: Well, I got fouled up in that damn poker game and didn't get to show up. So, I sent Mike over there and he said you wasn't there.

Boone: Well, hell, I was there, I stayed thirty minutes after, past time.

Archel: Well, what I done, at fifteen till five I was at your trailer at fifteen till five and you were gone over there. See, I picked the dry cleaning and stuff up, and you was gone then, I decided to come on over in town—

Boone: Sometimes I've got my car in the garage and I'm in the house though.

Archel: Yeah, well, I didn't—hell, I blowed and nobody answered, I blowed several times.

Boone: Well, now, I was suppose to meet you at 6:00 o'clock and I was up until 6:00 o'clock and stayed until 6:30.

Archel: Well, okay.

Boone: Why, don't you come up there to that same place we was talking about when your daughter comes.

Archel: Where is that?

Boone: On top of the hill, around the hill there, the first place, Joe's first place around there.

Archel: Well, I don't care where I come, but the hell, I don't want we better get somewhere another where we can't be seen.

Boone: Well, hell, you'd be seen up there a whole lot quicker, up there where you are talking about.

Archel: If you try to get out some place like that and they do happen to spot you or some another, they'll want to know what in the hell's coming off. Why don't you let me call you in the morning and when I get back, I won't be back until tomorrow, some time tomorrow, when I get back, I'll call you and you meet me somewhere tomorrow . . .

Boone: Well, I ain't got no use for those darn papers if I can't get my lawyers to look over them.

Archel: Well, you want the lawyers to meet with me too and things on them, don't you?

Boone: Well, yeah, but I'm meeting with my lawyers tomorrow and if I put it off until—

Archel: Well, hell, if they are going to be here tomorrow, why don't you just tell me where then, they ain't many people stirs on Sunday now.

Boone: Well, you'd be afraid to bring it up to the lawyer's office, wouldn't you?

Archel: No, I ain't afraid to bring it up there.

Boone: Well, I'll be there tomorrow at—

Archel: What time you want me to bring it in there?

Boone: I'll be up there at 3:00 o'clock.

Archel: 3:00 o'clock.

Boone: Yeah.

Archel: In Charles Lowe's office?

Boone: Yeah.

Archel: Well, that is alright with me, I'll just bring it up there and you can pay me now, I need the damn money, Boone, I'm pretty close and my case is coming up too.

Boone: Well, I was aim to go with you—aim to get with you the other night, give you a little more money, but I couldn't get with you.

Archel: Well, alright, damn it, I'll meet you up there at 3:00 o'clock tomorrow then.

Boone: Well, alright.
Archel: I'll see you tomorrow, Boone, that's for sure.
Boone: Okay.
(End tape)

TRANSCRIPT OF MARCH 4th, DAVIDSON-DESKINS CONVERSATION AND TESTIMONY OF SGT. CAMPBELL
T. E., Vol. IV, pp. 566-568

114. Now, Sgt. Campbell, do you have an additional recording, obtained in the same manner?

A. Yes, sir.

115. When was that obtained?

A. It was obtained on Sunday, March 4th, at about ten minutes till 8:00.

116. Would you play that please?

A. Yes, sir.

(Reporter's note: Conversation between the defendant and the informant, Archel Davidson, taped on March 4th, 1973, was then played to the jury, as follows:)

(Horn blows)
Davidson: Hey, Boone, this is Archel.
Deskins: Huh?
Davidson: This is Archel.
Deskins: Yeah, come in.
Davidson: Ah, I hadn't oughta be here much.
Deskins: Huh?
Davidson: Come, come out, come here a minute. God damn, I, I hadn't ought to be around this trailer very long. I just need some money then let me go, God damn it.
Deskins: Well, come in, damn it, to the light, so I can give it to you.
Davidson: Well, go in there and count it out and bring it out here.

Deskins: Come in here and get it.

Davidson: Well, count it out and bring it out here, I'll wait on you.

(Pause)

Deskins: (Garbled) Here is a hundred and fifty, but that is all you're gettin' this evening. I'll give you another fifty as quick as I run into you or you come over here any night and get it.

Davidson: Well, okay, Boone.

Deskins: I've got some checks in my pocket and I couldn't get them cashed.

Davidson: Yeah, Well, what did—did the lawyers think that was alright today, was it?

Deskins: Well, they wasn't none of it worth a shit to me now, but except one woman there.

Davidson: Yeah, well, I didn't know, you know, I didn't know.

Deskins: Yeah.

Davidson: Well--

Deskins: But that's all of it?

Davidson: Well, yeah, I'd say it is.

Deskins: Yeah, well, uh anytime I can run into you, you come over here and I'll give you another fifty.

Davidson: Well, okay then. Alright, okay.

(Following playing of tapes)

The Court: All right, ladies and gentlemen, take your seats back in the jury box.

117. Sgt. Campbell, you say this last tape was recorded at about ten till 8:00?

A. Yes, sir.

118. A.M. or P.M.?

A. P.M. night.

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SUPREME COURT OF THE UNITED STATES

IN THE

OCTOBER TERM, 1974

NO. 74-695

BOONE DESKINS .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY .....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *Boone Deskins* v. *Commonwealth of Kentucky*, reported at 512 S.W. 2d 520 (1974).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. § 1257 (3). the proper provision for review of a state court judgment in a criminal case on certiorari.

The question the petitioner attempts to present here under the Fourteenth Amendment of the Constitution of the United States has never been properly presented to

or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

In *Columbia Water Power Co.* v. *Columbia Electric R.L.&P. Co.*, 172 U.S. 475, 43 L.ed 521, 19 S.Ct. 247 (1898), this Court in discussing jurisdictional requirements stated:

> "There is no doubt that under the third class the Federal right, title, privilege, or immunity *must be*, with possibly some rare exceptions, *specifically set up or claimed* to give this court jurisdiction." (Emphasis added.)

Rule 23-1(f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the cour. of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (e. g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review*

> *the judgment on writ of certiorari.*' (Emphasis added.)

A review of the record of the state court proceedings in the instant case shows that petitioner did not specifically set up or raise a federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655, 41 L.ed 1149, 17 S.Ct 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rights rather than state rights. See *New York Central & Hudson River Railroad Co.* v. *New York*, 186 U.S. 269, 273, 46 L.ed 1158, 22 S.Ct. 916 (1901).

The fact that petitioner cited a United States Supreme Court case in his briefs to the state court is neither sufficient to raise a federal question nor sufficient to establish jurisdiction. Jurisdiction cannot be founded by surmise. *Lynch v. New York ex rel Pierson*, 239 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934). This application for writ of certiorari should be denied, because petitioner failed to set out or raise a federal question with sufficient

definiteness so as to bring such question to the attention of the state courts.

Even if petitioner could be said to have raised a federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock v. Memphis,* 20 Wall 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

As this Court stated in *Durley v. Mayo,* 351 U.S 277, 100 L.ed 1178, 76 S.Ct. 806:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause . . . And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it."

The Kentucky Court of Appeals concluded, based upon a finding of fact that the petitioner's attorneys were aware of the meetings between Deskins and Davidson, and upon substantial state grounds, that the petitioner was not denied a fair trial.

Notwithstanding that petitioner had properly raised

in the state courts the question he presents here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. Thus, determination of the question that petitioner brings here was unnecessary by the state court in its decision of this case.

For the foregoing reasons, respondent submits that petitioner's application for certiorari should be denied because it fails to meet jurisdictional requirements.

QUESTION PRESENTED

WHETHER THE KENTUCKY COURT OF APPEALS, BASED ON SUBSTANTIAL STATE GROUNDS, CORRECTLY DECIDED THAT PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE ADMISSION OF SURREPTITIOUSLY RECORDED POST INDICTMENT CONVERSATIONS BETWEEN PETITIONER AND ANOTHER INDIVIDUAL.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED, BASED ON KENTUCKY LAW, THAT THE PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE ADMISSION INTO EVIDENCE OF HIS SURREPTITIOUSLY RECORDED POST INDICTMENT STATEMENTS.

The petitioner herein contends that he was denied a

fair trial by the admission of statements made by him and surreptitiously recorded by law enforcement officers. This assertion is based primarily upon the case of *Massiah v. United States*, 377 U.S. 201. There are, however, in this instance, circumstances which place this case outside the rationale of *Massiah*.

In this case the petitioner, who was under indictment and represented by counsel, initiated a contract with a private individual and attempted to have this individual steal material from the Commonwealth's files and sell them to him. This individual, was not, at the time of the initial contact (and probably at no time), an agent of the Commonwealth. After the individual was contacted, instead of seeing fit to be dishonest and actually steal the Commonwealth's file, he contacted the proper law enforcement officers. Shortly after these contacts were initiated and after only two meetings between petitioner and Davidson, the Commonwealth went to the Court, in camera, set forth the circumstances, and obtained an order authorizing the electronic surveillance and recording of subsequent meetings between petitioner and Davidson.

The Kentucky Court of Appeals correctly decided, based on substantial state law that Davidson was not an agent of the Commonwealth and that the statements made by petitioner to him were admissible evidence. This ruling was correctly based upon the premise that it would be folly to hold that just because a defendant is under indictment and represented by counsel that he cannot have incriminating statements used against him when he seeks out an individual (who in this case was not even a government agent) and solicits his support in obstructing justice.

Based upon these circumstances, the Kentucky Court correctly decided that petitioner was not denied his right to counsel.

CONCLUSION

The petitioner has failed to properly meet the jurisdictional requirements or to present a substantial federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ed W. Hancock, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on December 27th, 1974, addressed to counsel for petitioner, Richard E. Vimont, Esquire, 139 Market Street, P. O. Box 2086, Lexington, Kentucky 40501.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-695

BOONE DESKINS, - - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Petition For a Writ of Certiorari to the
Kentucky Court of Appeals

MEMORANDUM IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-695

BOONE DESKINS, - - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

MEMORANDUM IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

In its BRIEF FOR RESPONDENT IN OPPOSITION, the Respondent raises for the first time two arguments to which Petitioner addresses this reply, pursuant to Rule 24(4) of the Rules of the Supreme Court.

I.

Respondent contends that this Court lacks jurisdiction under 28 U.S.C. §1257(3) because the Petitioner failed to "raise a federal claim with sufficient definiteness so as to bring such question to the attention

of the state courts." Brief In Opposition, pages 3-4. This assertion is nothing less than an attempt to mislead the Supreme Court of the United States.

One need only read the Opinion Below of the Kentucky Court of Appeals, *Deskins* v. *Commonwealth of Kentucky*, 512 S. W. 2d 520, to ascertain that a federal question was properly raised and ruled upon. We refer the Court to the Opinion Below at 512 S. W. 2d 526, PETITION FOR A WRIT OF CERTIORARI, page 10a, where the Kentucky Court notes:

> "Deskins' third argument again concerns the tapes. Under *Massiah*, supra, *he contends that* since he was represented by counsel at the time the tapes were made, *he was denied his Sixth Amendment right to counsel.*" (Emphasis added.)

Obviously the Kentucky Court was fully cognizant of the federal question before it. The "third argument" to which it refers appeared in the Petitioner's brief to that Court under the following heading:

> "ARGUMENT 3
>
> IT IS PREJUDICIAL ERROR REQUIRING A NEW TRIAL FOR THE COURT TO ALLOW EXTRA-JUDICIAL STATEMENTS OF THE ACCUSED INTO EVIDENCE WHEN SUCH STATEMENTS HAVE BEEN OBTAINED IN VIOLATION OF THE ACCUSED'S RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION," (Brief for Appellant, page 18.)

The Respondent knew that a federal question had been raised since it stated in its brief to the Court below the following:

> "Appellant, citing *Massiah* v. *United States,* 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 199 (1966), contends that due to the fact that he was under indictment for murder and was represented by counsel at the time the tapes were made that he was denied his Sixth Amendment right to counsel." (Brief for Appellee, page 17.)

There can be no doubt that the federal question was sufficiently raised. Regardless of whether there was a proper presentation of the federal question in the Court below, the Kentucky Court of Appeals ruled on the federal question at 512 S. W. 2d 526 (PETITION FOR A WRIT OF CERTIORARI, page 12a):

> "We conclude, as did the trial court, that Deskins was not denied his Sixth Amendment right to counsel."

With due respect to the venerable authority cited by Respondent, we direct the Court's attention to *Raley* v. *Ohio,* 360 U. S. 423 (1959) at page 436, where, upon recognizing its jurisdiction under 28 U.S.C. §1257(3), this Court stated:

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. See *Manhatten Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134."

See also *Coleman* v. *Alabama,* 377 U. S. 129, 133 (1963).

II.

As to the Respondent's second contention, that the decision of the Kentucky Court of Appeals from which this review is sought was based upon non-federal grounds, we ask only that the Court look to the relevant portion of the Opinion Below: 512 S. W. 2d at page 526, or pages 10a-12a of the PETITION FOR A WRIT OF CERTIORARI. There, the federal question raised by Petitioner in the Court below, and presented in the PETITION FOR A WRIT OF CERTIORARI was disposed of by the Kentucky Court, holding the federal law embodied in *Massiah* inapplicable and finding support for its opinion exclusively in two decisions of the United States Supreme Court. *Absolutely no state law is even mentioned, much less relied upon to resolve the issue.*

CONCLUSION

Petitioner sincerely regrets the imposition on the valuable time of this Court necessitated by the Respondent's Brief in Opposition. Its arguments are so utterly void of merit as to render it a sham, tendered to obscure rather than to enlighten.

We note, however, that Respondent does not deny the importance and substantiality of the question presented, the need for review being indisputable. Accordingly, we respectfully submit that the Writ of Certiorari should be granted. We further note that Respondent expressly acknowledges, and in effect stipulates, that the Statement of the Case set forth in

the PETITION FOR A WRIT OF CERTIORARI is substantially correct. That being so, the case is squarely within the scope of the *Massiah* rule and indistinguishable from *Beatty* v. *United States,* 389 U. S. 45 (1967). We respectfully suggest that, as in *Beatty,* summary reversal is warranted.

Respectfully submitted,

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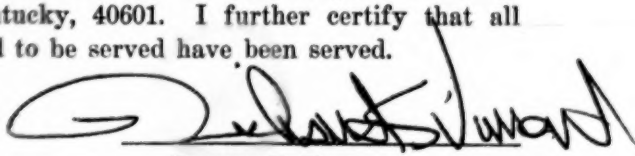
CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 1975, three copies of the foregoing Memorandum In Reply To The Brief For Respondent In Opposition were served upon Respondent by depositing same in the United States Mail, postage prepaid, in an envelope addressed to the Honorable Ed W. Hancock, Attorney General and G. Edward James, Special Assistant Attorney General, Capitol Building, Frankfort, Kentucky, 40601. I further certify that all parties required to be served have been served.



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